given the job of a pointsman which is one grade lower than his previous post of an assistant shunter yet he continues to receive the same salary. The workman's earning capacity has therefore not been proved to have been reduced. The president sessions court was therefore right in rejecting the appellants' claim for indemnity in respect of the sum of $1,659.12 awarded by the commissioner as compensation.

As to the sum of $587.50 which the appellants are claiming for indemnity it was never awarded as compensation by the commissioner; therefore in my view this sum does not fall within the scope of compensation under the Workmen's Compensation Ordinance. The president sessions court therefore rightly rejected the claim for indemnity in respect of this amount as well.

In the circumstances the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. ANG AN AN
PUBLIC PROSECUTOR v. ENG HOCK

[A.CrJ. (Raja Azlan Shah J.) January 19, 1970]

[Kuala Lumpur — Criminal Appeal Nos. 80 & 81 of 1969]

Road Traffic — Pirate taxi — Evidence of past observations — Whether relevant — Road Traffic Ordinance, 1958, ss. 74 (2), 92 (1) & 144 (c).

Evidence — Admissibility of, of past observations — Presumption under Road Traffic Ordinance, 1958, s. 144 (a) — Evidence Ordinance, 1950, s. 15.

Criminal Law and Procedure — Charges — Joinder of — Joinder not objected to — Whether prejudicial to accused.

The respondents in these appeals were each charged under section 92 (1) of the Road Traffice Ordinance, 1958, for using a motor vehicle as a public service vehicle without a valid licence under Part V of the Ordinance and under section 74 (2), for using the same vehicle without the necessary policy of insurance in respect of 3rd party risks.

The facts in both cases were similar. In the first case the prosecution relied on the evidence of two police officers and the enforcement officer of the Road Transport Department. Their evidence revealed that during a period of observation from March 11, 1968 until April 2, 1968, the respondent had on 39 occasions conveyed a total of 133 different passengers in car NA 9731. On April 2, 1968 the said vehicle was stopped by the police officers and they found 4 passengers in it, with the respondent as driver. At the end of the prosecution case both respondents were acquitted and discharged. Both appeals raised the same question of law, and were heard together.

Held: (1) evidence of past observations are relevant and therefore admissible under section 15 of the Evidence Ordinance, not only to supply the necessary groundwork to raise the presumption under section 144 (a) of the Road Traffic Ordinance, but also to anticipate any possible defence which would otherwise be open to the accused. Such evidence is not to be substituted as proof of the alleged facts which constitute the offence;

(2) charges under section 92 (1) and section 74 (2) of the Road Traffic Ordinance should be heard together unless, in the exceptional case, the accused is likely to be prejudiced by the joinder of the charges. In these cases the joinder could not have prejudiced the accused in any way.

Cases referred to:-

(1) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.
(2) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44.
(3) *Public Prosecutor* v. *Ong Hock Thuan* [1963] M.L.J. 10.
(4) *Din* v. *Public Prosecutor* [1963] M.L.J. 37.
(5) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146, 148.
(6) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.
(7) *Leong Sow Lin & Anor.* v. *Public Prosecutor* [1967] 2 M.L.J. 164.
(8) *Public Prosecutor* v. *Ong Kok Tan* [1969] 1 M.L.J. 118.
(9) *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65.
(10) *R.* v. *Raju & Ors.* v. *R.* [1953] M.L.J. 21.
(11) *Maidin Pitchay & Anor.* v. *Public Prosecutor* [1968] 1 M.L.J. 82.
(12) *Public Prosecutor* v. *Ooi Seng Huat* [1968] 2 M.L.J. 168.

MAGISTRATE'S CRIMINAL APPEAL.

Sulaiman bin Hashim (Deputy Public Prosecutor) for the appellant.

Lal Singh Mukher for the 1st respondent.

M. Segaram for the 2nd respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: In both these cases, under appeal the respondents were charged under section 92 (1) of the Road Traffic Ordinance 1958 for using a motor vehicle as a public service vehicle without a valid licence granted under Part V of the Ordinance and under section 74 (2) of the Ordinance, for using the same vehicle without the necessary policy of insurance in respect of third party risks. At the end of the prosecution case both the respondents were acquitted and discharged. Both these appeals were heard together because they raised the same question of law.

In the first case the prosecution rested solely on the evidence of two police officers and the enforcement officer of the Road Transport Department. Inspector Abu Hassan bin Haji Ahmad testified that he received information on 11th March 1968 that motor car NA 9731 was being used as a pirate taxi. As a result he instructed PC.41679 to keep the said car under observation. The constable did so from 11th March 1968 until 2nd April 1968. During the period of observation he noted that the respondent had on 39 separate occasions conveyed a total of 133 (different) male and female passengers. On 2nd April 1968 the inspector and constable stopped the said vehicle. They found 4 passengers in it. The driver was the respondent. In the boot of the car there were one jack fruit, eggs and other miscellaneous goods belonging to the passengers. The enforcement officer testified that the car was registered in the respondent's name as a private vehicle. At the end of the prosecution case, the prosecution made available 3 of the passengers to the defence.

In the second case the prosecution also relied on the evidence of two police officers and an enforcement officer. As a result of information received by Insp. Abu Hassan bin Haji Ahmad that motor vehicle BP 1062 was being used as a pirate taxi, he detailed Cpl. 7703 to keep the said car under observation. The corporal did so from 14th April 1968 until 3rd May 1968. During that period he observed the same car 19 times at different places in town. The driver was always the respondent and altogether he had carried 69 (different) male and female passengers. On two or three occasions the corporal observed that the respondent had come from the direction of Port Swettenham and stopped in front of the MARA Bus Station soliciting for passengers and shouting "Ka Kuala Kuala" and he saw people getting into the said car. On 13th April 1968 the inspector and corporal stopped the car. It was driven by the respondent. There were four passengers in it. The enforcement officer testified that the said car was registered as a private vehicle in the name of Soo Seng. At the end of the prosecution case, the prosecution made available 3 of the passengers to the defence.

In a case under section 92 (1) of the Road Traffic Ordinance the prosecution have to prove that on the occasion stated in the charge the accused conveyed passengers for reward or hire and that the vehicle was used without there being in force a valid licence to cover such user. With the aid of the presumption under section 144(a) of the Ordinance a *prima facie* case against an accused person may be established. This statutory presumption is merely a conclusion or inference of fact to be drawn "in so far as it may be necessary to establish the offence charged". In my view these words are inserted in section 144 for a specific purpose and should not be construed as meaningless surplusage. Without them the presumption would automatically arise and render any driver liable to prosecution even when he carries his wife or a friend as a non-paying passenger, forcing the court in every case to call on the defence to prove the passenger's status or relationship to the owner or driver of the vehicle. This would veritably make the law an ass. In order, therefore, that such strict interpretation should not prevail to the point of absurdity, it has been held that there must be adequate groundwork — not mere suspicion — based on past observations, before any prosecution is instituted and there is clearly a preponderance of authority in favour of this view.

In *Gan Chye Huat* v. *Public Prosecutor*[1] H. T. Ong J. (as he then was) had occasion to observe that before the statutory presumption could arise "there must at all times be adequate groundwork". In that case the driver of the vehicle was convicted under section 92 (1) of the Ordinance "on the strength of an unwarranted suspicion by the railway detective." It must be noted that in that case no adequate observation was made on the said vehicle except on the day of the charge. There was, on the other hand, sufficient groundwork to apply the presumption in *Abdul Hamid* v. *Public Prosecutor*.[2] In that case the police had kept the car under observation for two months before they detained and seized it. In *Public Prosecutor* v. *Ong Hock Thuan*[3] the vehicle concerned was kept under observation for some 23 days. *Din* v. *Public Prosecutor*[4] was a case which turned on the interpretation of the phrase "hire or reward". Suffian J. (as he then was), allowed the appeal on the evidence given by the defence that the appellant did not intend to accept from the passengers a payment which he was expected to be tendered when he had given them the ride. In any event the prosecution had established a *prima facie* case by adducing evidence of past observations of the vehicle concerned for a continuous period of 9 days. In *Darus* v. *Public Prosecutor*[5] H. T. Ong J. (as he then was) elaborated on what he meant by adequate groundwork in *Gan Chye Huat* v. *Public Prosecutor, supra.* The learned judge held that 14 days' observation was adequate groundwork to raise the presumption. Ali J. (as he then was), in *Ali b. Hassan* v. *Public Prosecutor*[6] remarked that evidence of past observations was relied upon by the prosecution "obviously for the purpose of showing that the appellant was likely to have committed the offence with which he was charged" and he ruled such evidence to be irrelevant and inadmissible under section 15 of the Evidence Ordinance as they "could have no material bearing on the issues" under section 92 (1) which according to him were whether or not on the material date the conveyance of passengers was for hire or reward, and if it was, whether such conveyance was authorised by a valid licence. In *Leong Sow Lin & Anor.* v. *Public Prosecutor*[7] two police constables had observed for a fortnight that the appellant was carrying passengers but at the trial no evidence was adduced that the passengers carried on each occasion were the same or not. That led McIntyre J. to hold that they might well have been members of the appellant's family, in which case there could have been no justification for any suspicion that they were being carried for hire or reward. In the circumstances he held that the evidence of the two police constables could not be regarded as sufficient groundwork to raise a presumption. On a reference Azmi L.P. after reviewing some of the authorities cited above, including *Ali b. Hassan* v. *Public Prosecutor, supra,* answered the question whether evidence of past observations are relevant and therefore admissible in the affirmative (see *Public Prosecutor* v. *Ong Kok Tan.*[8]) It is clear from the judgment of the learned Lord President that *Ali b. Hassan's* case was not followed and it can now be deemed to have been overruled.

Ali J. in *Ali b. Hassan* v. *Public Prosecutor, supra.* relied on the well-known passage of Lord Herschell in *Makin* v. *A-G. for New South Wales*[9] which is as follows:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

It is clear that Lord Herschell's first sentence lays down an absolute rule of prohibition on the adduction of evidence of misconduct on other occasions for the purpose of establishing guilt of the offence charged, while his second sentence is directed to the admissibility of misconduct on other occasions if it tends to rebut a defence that can fairly be said to be open to the accused, provided always that such evidence is relevant for some reason other than its tendency to establish guilt by proof of disposition. This principle was adopted and followed by Spencer Wilkinson J. in *R.* v. *Raju & Ors.* v. *R.*[10] where he laid down the circumstances in which such evidence is to be admitted.

Where an accused person claims trial, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary intent. Therefore in *Ali b. Hassan* v. *Public Prosecutor* it is not correct to say that the only issues were the conveyance for reward or hire and authorisation by a valid licence. The defence of a chance-meeting with the passengers, or giving a free lift, or that the passengers were members of the defendant's family, may amount to an assertion that, although the wrongful act alleged against the accused was committed by him, he lacked the requisite guilty intent to convey the passengers for hire or reward, as for example in *Din* v. *Public Prosecutor, supra*, where the defence set up was that the passengers were his friends. It is to rebut this type of assertion that evidence of past observations was quite rightly admitted by Adam J. in *Abdul Hamid* v. *Public Prosecutor, supra*, and H. T. Ong J. in *Darus* v. *Public Prosecutor, supra*. Such evidence was admissible because they were specific features which made each one of them bear a striking resemblance to the others; they show that the accused was doing a series of acts according to a particular pattern. It is in accord with this line of reasoning that had led McIntyre J. in *Maidin Pitchay & Another* v. *Public Prosecutor*[11] to dissent from the view which Ali J. had taken and associate himself with the views expressed in *Abdul Hamid* v. *Public Prosecutor* and *Darus* v. *Public Prosecutor*.

In the light of these authorities it is settled law that evidence of past observations are relevant and therefore admissible under section 15 of the Evidence Ordinance, not only to supply the necessary groundwork to raise the presumption under section 144 (a) of the Ordinance, but also to anticipate any possible defence which would otherwise be open to the accused. Such evidence is not to be substituted as proof of the alleged facts which constitute the offence. But when the existence of these facts has been established by evidence *aliunde* and the only question which remains to be decided is whether they were done accidentally or intentionally or with the particular knowledge or intention, then and only then evidence of past observations becomes relevant and admissible, provided (a) it is shown that such past acts are of the same specific kind; and (b) they form part of a series of occurrences in which the person committing the act is concerned; such acts need not form part of one continuous occurrence; (see *Public Prosecutor* v. *Ooi Seng Huat*[12]).

The next question that arises is whether a joinder of two charges under section 92 (1) and section 74 (2) of the Ordinance in one trial is proper.

In my view the desirability of the trial of an offence under section 92 (1) together with one under 74 (2) of the Ordinance is obvious. To establish the offence under section 92 (1) evidence of groundwork observations must be given by the prosecution to raise the presumption under section 144 (a). Once the presumption is raised, a *prima facie* case is established that the accused was conveying passengers for hire or reward. Thereupon a fact requiring proof, which is common to both charges, is that the vehicle concerned is not licensed as a public service vehicle. The onus of proof rests on the prosecution and once such evidence is produced, both charges would have been established. In other words, evidence of the alleged offence under the first charge would be evidence of the alleged offence under the second charge. Hence there is ample justification to charge the accused with the two offences at one trial. If the charges are tried separately it would mean that both the prosecution and the accused are put to unnecessary trouble inasmuch as the prosecution will have to produce the same evidence twice and the accused will have to test the credibility of the evidence a second time. The time of another court will be again spent a second time in determining the same question. There would be the risk of the second court coming to a different conclusion from that of the first court.

To sum up, it is a matter of discretion in each particular case. Generally speaking both charges should be heard together unless, in the exceptional case, the accused is likely to be prejudiced by the joinder of the charge (see *Public Prosecutor* v. *Ong Kok Tan, supra*).

Here I am quite satisfied that the joinder of the charge under section 74 (2) cannot prejudice the accused in any way.

In both the cases under appeal, both the respondents were represented by counsel and they had not objected to the joinder.

For the above reasons I direct the trial magistrate to call on the defence in both the cases.

Order accordingly.

Solicitors: *Lovelace & Hastings; M. Segaram & Co.*